United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-3025
76-1189

to be argued by
NANCY ROSNER

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT OF NEW YORK

- -X

VIRGIL ALESSI,

76-3025

Petitioner-Defendant

-against-

HONORABLE DUDLEY B. BONSAL,

- -X

- -X

UNITED STATES OF AMERICA

76-1189

-against-

VIRGIL ALESSI,

Petitioner-Appellant

- -X

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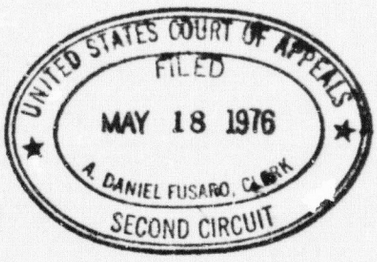
BRIEF FOR THE APPELLANT



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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

On August 4, 1975, an indictment was returned in the Southern District of New York charging Alessi and thirteen others with narcotics offenses. Predictably, the format of the indictment

included a conspiracy count and various substantive offenses. Suprisingly, Alessi was not charged in the conspiracy count though named as an unindicted co-conspirator. He pled not guilty and was released on a $50,000.00 personal recognizance bond.

Thereafter, he moved to dismiss the indictment because it violated the terms of an agreement between Alessi and the government made in exchange for his plea of guilty to an information charging him with conspiracy to violate the narcotics laws in the Eastern District of New York in October, 1972. That agreement is the subject of this Court's recent opinion in United States v. Papa, ___F.2d___, slip op. at 2977.

After receiving briefs from both sides, the District Court entered an order on December 29, 1975 declining to decide appellant's application until after the conclusion of the trial, then scheduled for January 20, 1976. A timely notice of appeal was filed. The government moved to dismiss the appeal. This Court treated appellant's answering papers as a petition for a writ of mandamus and granted the writ on January 19, 1976. This Court ordered the trial court to decide Alessi's motions pretrial. As a result Alessi was severed and the trial commenced as to the remaining defendants two days later.

On February 11, 1976 the District Court heard oral argument on the motion. On April 6, 1976 the District Court denied the motion to dismiss. A notice of appeal was filed

April 13, 1976. During the pendency of this appeal, the District Court scheduled the trial to commence on May 4, 1976. To stay the trial until the decision in this appeal, a mandamus proceeding was filed in this Court on April 29, 1976 and on May 6, 1976, it was ordered that the trial of Virgil Alessi on Indictment No. 75 Cr 772 be stayed pending the determination of this appeal. (That order also specified a schedule for the filing of briefs and appendices and set down June 9, 1976 as the date for argument in this appeal.)

Virgil Alessi was a co-defendant in a series of three indictments filed in the Eastern District of New York over a four month period in early 1972. The final Eastern District indictment, 72 Cr 473, filed May 1, 1972, was a consolidation of the earlier two indictments, 72 Cr 88 and 72 Cr 433. The May indictment charged Alessi and others with conspiracy to violate the federal narcotics laws from on or about April 1, 1967, to December 18, 1971. In addition, Alessi was charged with violating 21 U.S.C. §848.

In August 1972 Vincent Papa, a co-defendant with Alessi in 72 Cr 473, began plea negotiations with Eastern District Strike Force attorney James Druker. In September 1972 Papa pleaded guilty to 72 Cr 473 and was sentenced to a term of 5 years imprisonment.

On October 2, 1972, Virgil Alessi pleaded guilty to

73 Cr 1133, an information, which charged him with participating in a conspiracy in violation of 21 U.S.C. §841(a)(1); 21 U.S.C. §841(b)(1)(a) and 21 U.S.C. §846. The same day, Virgil Alessi was sentenced by Hon. Anthony J. Travia, U.S.D.J., E.D.N.Y. to a five year suspended sentence and a three year special parole. The three outstanding indictments (72 Cr. 88, 72 Cr. 433 and 72 Cr. 473) were then dismissed. The dismissal of these indictments was part of a plea bargain agreement. The other part of that agreement provided that Virgil Alessi would not be prosecuted for any overt act committed during the course of the conspiracy. (As alleged in 72 Cr. 473,April 1, 1967, December 18, 1971). The currently pending indictment, S75 Cr 772, the subject of this appeal, violates the government's promise. The United States of America should be held to its word and the indictment should be dismissed.

POINT I

THE DISTRICT COURT'S ORDER DENYING APPELLANT'S MOTION TO DISMISS PREDICATED ON HIS AGREEMENT WITH THE GOVERNMENT IS A "FINAL DECISION" WITHIN THE MEANING OF 28 U.S.C. §1291 AND THUS IS APPEALABLE.

One of the two statutory bases for this Court's jurisdiction to act in this case is 28 U.S.C. §1291 which provides"

> "The Court of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States..."

This single, rather simple sentence is the source of all power for the courts of appeals in all appeals by defendants in criminal cases and most appeals by both plaintiffs and defendants in civil cases. Compare 28 U.S.C. §1292 and 18 U.S.C. §3731. Further, the deceptively plain phrase "final decisions is the litmus test for the statute's applicability.

Clearly, the day has long since passed when any flat interpretation could be sustained that "final decisions" was identical to "final judgment" in either civil or criminal cases. See DiBella v. United States, U.S. 369 121 (1962) Stack v. Boyle, 342 U.S. (1951); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and Perlman v. United States, 247 U.S. 950 (1918).

Indeed, the Supreme Court has plainly so stated:

> "It is obvious that if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable."

Cohen, supra at 545.

Many cases prior to Cohen had implicitly reached the same result. Compare DiBella, supra; Carroll v. United States, 354 U.S. 394 (1957); Cogan v. United States, 278 U.S. 221 (1929), Burdeau v. McDowell, 256 U.S. 465 (1921) (appealability of pre and post indictment motions to suppress and for the return of property); Cobbledick v. United States, 309 U.S. 323 (1940); Perlman v. United States, supra (appealability of a motion to quash subpoena), Stack v. Boyle, supra (appealability of a motion to reduce excessive bail); See also Berman v. United States, 302 U.S. 211 (1937) (appealability of a probationary sentence).

Cohen not only laid to rest the "final judgment" rubric, it also explicated the policy basis for appealing preverdict orders and the standards to be applied to determine appealability of a given order:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeney, 1 Pet (US) 567, 569, 7 L ed 265, 266; United States v. River Rouge Improv. Co.

> 269 US 411, 414, 70 L ed 339, 343, 46 S Ct 144; Cobbledick v. United States, 309 US 323, 328, 84 L ed 783, 786, 60 S Ct 540.
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

Cohen, supra at 546-547.

Anyone inclined to view Cohen's interpretation of §1291 as a parsimonious dole of power to the Appellate Courts need only review its facts. Cohen was the plaintiff in a stock holder's derivative action litigated in Federal Court only on the basis of diversity of citizenzhip. The asserted right for which pretrial appeal was sought was a state statutory right of the defendant's to have the plaintiff post security, a money right rather than an equitable remedy which certainly could have been demolished by a judgment in favor of the plaintiff and probably was remediable by monetary damages on a verdict for the defendants. How much more worthy of preverdict review is a defendant's constitutional right not to be prosecuted at all let alone tried.

Thus, fairly read, Cohen does not carve out an exception for some anomalous, rui generis groups of decisions. It sets forth principles to determine the applicability of §1291. That in cases of final judgments those principles are simple of resolution, does not mean that otner decisions may not also fit the framework.

Not only are there no neat analytical pigeonholes to define the concept of "final decisions", the appealability of a given type of motion may depend on the merit of application. Thus, the Cohen Court indicated that if the issue were only the appropriate amount of security to be posted, not the right to any security at all, review might be declined:

> "If the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."

Cohen, supra at 545-547.

Technically the reasoning is lack of power; practically, it is justfiable in policy terms to review the total deprivation of a right whose availability is a pure question of law but not justfiable to review exercise of discretion that relies on factual judgments the appellate court is not in an equal position to make. Thus, appealability, even in a given class of decisions, can vary.

Of course the acid test of Cohen's interpretation in §1291 is its ability to harmonize the case law. Many cases contain general language that motions to dismiss are not appealable. However, that category is too gross for the refined analysis of Cohen and if the focus is leveled at the facts and results, a consistent pattern emerges.

In Parr v. United States, 351 U.S. 513 (1956) the defendant successfully moved fo. a change of venue. In response the government successfully moved to nolle prosequi that indictment and reindicted in a different district. The defendant appealed the granting of the government's motion to dismiss the first indictment but did not move to dismiss the second indictment on any theory of plea in bar. Relying on Lewis v. United States, 216 U.S. 611 (1910) the Court found the order not appealable because the defendant was not aggeieved by the result, not on any general theory that motions to dismiss were not appealable.

Far from reaching that conclusion, even in dictum, at 517 n.9 the Court distinguished those cases where the right to a termination of the action was asserted prior to judgment which right could be asserted by appeal:

> "In all of the cited cases, therefore, the defendant was asserting a right to a judgment on the basis of the progress of the action prior to the nonsuit-a substantial right going to the merits of the controversy of which he had been deprived by the nonsuit."

In Lewis v. United States, supra, the defendant had repeatedly moved to dismiss on speedy trial grounds. Those applications were denied. The government then moved to nolle and the defendant moved to set aside the nolle. The defendant appealed only the denial of the motion to set aside the nolle, not the ruling on his speedy trial claim. The

Court held that he was not aggrieved by the nolle and thus it was not an appealable order, noting specifically that the speedy trial claim was not before it.

Similarly, heavy reliance is frequently and improperly placed on Heike v. United States, 217 U.S. 821 (1910) for the proposition that motions to dismiss are not appealble. There the defendant moved to dismiss on the theory that he had been given immunity from prosecution by the statute. The Court construed the statute as permitting prosecution but providing a defense on the merits of the charge. Thus the motion to dismiss was theoretically ill founded. It would be comparable to moving to dismiss for insufficiency of the evidence. To the extent that Heike says any more it is unwarranted dictum.

Rankin v. Tennessee, 11 Wall 380, 20 L.Ed. 175 (1871) involved a state appellate court's reversal of the granting of a motion to dismiss on double jeopardy grounds. The court found no appellate jurisdiction under a statute permitting review of "final judgments" from state courts. Clearly,that phrase is not synonymous with "final decision" which as Cohen makes plain is something more. Since the question is one of statutory interpretation the distinction is critical and Rankin is obsolete.

Cohen's analysis even makes intelligible the various opinions of the circuit courts. United States v. Garber, 413 F.2d 284 (2d Cir. 1969) despite its own clear language is frequently cited for the proposition that pretrial motions to

dismiss are not appealable though the applications in that case were denied with leave to renew "at or near" the time of trial. Thus, there was no "final decision" of any kind for the appellate court to act on.

United States v. Foster, 278 F.2d 567 (2d Cir. 1960) involved consolidated appeals from motions to dismiss because the defendant was too ill to stand trial and to extend his bail limits. Since both decisions were discretionary in the sense of depending on first hand evaluation of the facts, the court found no appellate jurisdiction.

> "In the case at bar whether the bail limits should be extended is a matter within the discretion of the judge. Hence recognition of the appealability of the order is somewhat of an extension of the Stack case. But in the rare case where the movant contends that denial of the motion is an arbitrary exercise of discretion and violates his constitutional rights, we believe the order should be appealable."

278 F.2d at 569.

Finally, a number of cases typified by United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963) have decided that motions for judgment of acquittal based on insufficiency of evidence after a mistrial occasioned by a hung jury are not appealable. This is perfectly consistent with Cohen since Bryant v. United States, 338 U.S. 552 (1950) long ago established that retrial is discretionary after mistrial or reversal where an insufficiency of evidence in the first trial is apparent. Again, the discretionary nature of the relief is inconsistent with appellate review.

In any event, this Court presently thinks little of the authority of Kaufman. See United States v. Beckerman, 516 F.2d 905 at 906 (2d Cir. 1975):

> "Its argument relies heavily on United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963), and United States v. Ford, 237 U.S. 57 (2d Cir. 1956), vacated as moot, 355 U.S. 38, 78 S.Ct. 114, 2 L.Ed.2d 71 (1957).
>
> In Kaufman the question was presented in the context of the sufficiency of the evidence, rather than double jeopardy. The defendants were convicted on two substantive counts; the jury was unable to reach a verdict on the third count which charged conspiracy. Affirming the convictions on the substantive counts, the Court dismissed, as premature, the appellants' contention that the trial court should have dismissed the conspiracy count for insufficient evidence. The issue of double jeopardy was only obliquely considered in Ford, supra, in an opinion which affirmed convictions on three other counts. More importantly, its precedential authority has been undermined since the opinion was later vacated as moot."

United States v. Beckerman, supra at 906.

Likewise United States v. Carey, 476 F.2d 1019 (9th Cir. 1973) which relies on Kaufman is nil.

The concept of Cohen was logically extended by this Court to provide a pretrial appeal in criminal cases where the defendant asserts a right not to be tried twice on constitutional grounds in United States v. Beckerman, supra. While the claim in Beckerman was predicated on the double jeopardy clause, that case neither directly, nor inferentially by its rationale, limits its rule to jeopardy pleas. What it sets forth are those conditions warranting pretrial disposition, both at trial and appellate level, of a defendant's claim. This Court's own language best describes the criteria:

> "The Supreme Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), recognized that there is a "small class" of decisions from which an appeal is properly taken under §1291, even though final judgments have not been entered. The Court identified the characteristics of that narrow area of cases where an appeal will lie: (1) the order finally determines rights "separable from and collateral to" the main action. (2) the collateral rights so determined are "too important to be denied review.", and (3) those rights "will have been lost, probably irreparably" after final judgment is entered. Id. at 546, 69 S.Ct. at 1225. These features mark the denial of a plea of double jeopardy. Although the indictment persists, and a retrial may follow, the order appealed from bears the charcteristics defined in Cohen..."

United States v. Beckerman, supra at 906.

This case, because it involves a contractual extension of the protection of the jeopardy clause, naturally enough has the identical characteristics. For, though the enforcement of the agreement between the appellant and the government sounds in due process the substance of the agreement was protection against future prosecution. The ultimate right, though conferred by agreement, is identical to a plea of a former jeopardy and is no less enforceable either at the trial or appellate level.

Thus, under characteristic number one, Alessi's right not to be tried has nothing to do with guilt or innocence of the charges contained in the indictment, but stems from a 1972 guilty plea, a matter collateral to the issues to be tried by the jury.

Second, this right is logically indistinguishable, in substance, from a plea of former jeopardy and is too important

to be denied review.

As Stack v. Boyle, supra, indicates,the fact that a constitutional claim is involved may be in and of itself sufficient to satisfy the "importance" prong of the analysis.

Indeed, this claim is more deserving of review than an ordinary double jeopardy claim because it involves the breach of a specific agreement with the government and reflects on the integrity of the plea bargaining system which is literally indispensible to criminal justice as we know it. Third, just as with a jeopardy plea, the appellant's right not to be tried will be irreparably lost absent appellate review at this point. Specific enforcement of the agreement demands pretrial review.

Unlike Hieke, supra, the right asserted here is freedom from prosecution. What the defendant asserts is a right to terminate the action. Clearly, this disposition of such a motion must be a final decision. See also United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972) which has been followed in United States ex rel. Russo v. Superior Court of New Jersey, 483 F.2d 7 (3rd Cir.) cert den. 94 S.Ct. 447 (1973) overruling sub silento United States ex rel. Rosenberg v. United States District Court for the Eastern District of Pennsylvania, 460 F.2d 1233 (3rd Cir. 1972).

The right to appeal denial of a motion to dismiss on double jeopardy grounds set forth in Lansdown, which has been followed in this circuit,was rejected in United States v. Bailey, 512 F.2d 833 (5th Cir. 1975) based on this demonstrably false

reasoning:

> "If the hazards, expense and inconvenience of retrial are the consequences of the violation of the right, this case is no more distinguishable on finality grounds than a violation of any other constitutional right which results in the defendant's being subjected to the ordeal of a trial and conviction on the road to reversal.

United States v. Bailey, supra at 837.

Clearly, there is a distinction between a constitutional right not to be tried at all and the right to be tried in a constitutionally error free proceeding.

Further support for the application of the Cohen analysis to motions to dismiss on double jeopardy grounds comes from the rationale of Blackledge v. Perry, 417 U.S. 22 (1974) which held that collateral relief was available to review a due process motion to dismiss after a plea of guilty, even when no direct appeal had been taken. In distinguishing the state's authorities the Court said:

> "While petitioners' reliance upon the Tollett opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in Tollett and the Brady trilogy were constitutional dismensions, none went to the very power of the state to bring the defendant into court to answer the charge brought against him."

417 U.S. at 30

The Court concluded:

> "Last Term in Robinson v. Neil, 409 US 505, 35 L Ed 2d 29, 93 S Ct 876, in explaining why the double clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe the procedural rules that govern the

> conduct of a trial." Id., at 509, 35 L Ed 2d 29. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment is based. The 'practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge."

417 U.S. at 31

Surely this right which would survive a guilty plea is collateral enough for review now. It certainly is important enough for immediate review. And it is a right which can only be effectuated by review now.

POINT II

THIS APPEAL INVOLVES THE QUESTION OF FIRST IMPRESSION IN THIS COURT, WHETHER THE GOVERNMENT MAY CIRCUMVENT AN ADMITTED PROMISE NOT TO PROSECUTE IN THE EASTERN DISTRICT OF NEW YORK BY CHARGING THE APPELLANT WITH AIDING AND ABETTING OFFENSES COMMITTED IN THE SOUTHERN DISTRICT OF NEW YORK ALTHOUGH APPELLANT'S ACTS CONSTITUTING THE AIDING AND ABETTING ALL OCCURRED ESCLUSIVELY IN THE EASTERN DISTRICT OF NEW YORK.

The appellant was charged in 1972 in the Eastern District of New York with conspiracy and substantive violations of the narcotics laws. In October, 1972, he pled guilty to a superseding information charging conspiracy, in satisfaction of the indictment and in return for a promise that he would not be prosecuted in the Eastern District of New York for any overt acts committed in the course of that conspiracy which might constitute substantive offenses irrespective of whether the government then had knowledge or proof of those offenses. These contentions are reflected in this Court's opinion in United States v. Papa, supra. Appellant further contends that the substantive offenses charged here are overt acts of the conspiracy count which is the same as the conspiracy in the Eastern District indictment.

The theory of each substantive offense is identical. The government alleges that the appellant transferred narcotics to one Manfredonia in the Eastern District of New York which

Manfredonia, subsequently and without the appellant's knowledge, transferred to someone in the Southern District of New York. Thus the crime charged is Manfredonia's "receiving"* in the Southern District of New York, consisting of Manfredonia's sale to his customer. Appellant is allegedly his aider and abbetor because of appellant's earlier transfer to Manfredonia in the Eastern District of New York. Since the aiding and abetting occurred in one district and the principal offense in another, venue lies in either.

The government cannot circumvent its promise not to prosecute Appellant for his acts in the Eastern District of New York by electing venue in the Southern District of New York on the theory of aiding and abetting a subsequent transfer there.

*The choice of wording in the indictment bears noting. While 21 U.S.C. §174 includes the terms buy and sell, Manfredonia's acts are not characterized as a sale seemingly in recognition of the cases holding that appellant, as a seller, could not be charged with aiding and abetting, Manfredonia as a purchaser. Adams v. United States, 220 F.2d 297 (5th Cir. 1955), United States v. Moses, 220 F.2d 166 (3rd Cir. 1955), United States v. Sawyer, 210 F.2d 169 (3rd Cir. 1955). Rather, the government has strained to characterize Manfredonia's conduct as "receiving" in the Southern District of New York when a common sense view of the evidence shows that Manfredonia "received" in the Eastern District of New York. The evidence referred to emanates from the trial of appellant's co-defendants on this indictment. The bill of particulars, which is annexed as an exhibit, enuciates the same theory.

A

75 CR 772 IN THE SOUTHERN DISTRICT OF NEW YORK AND 72 CR 473 IN THE EASTERN DISTRICT OF NEW YORK ARE PREDICATED UPON THE SAME CONSPIRACY.

In order to apply this Court's criteria, set forth in United States v. Mallah, 503 F.2d 971 (2d Cir. 1974) and United States v. Papa, ___F.2d___(2d Cir. April 2, 1976) Docket No. 75-1208, for determining the factual identity of separately charged conspiracies, it is useful to outline and compare certain earmarks of each:

Period Encompassed:

72 Cr 473 returned in the Eastern District of New York encompasses the period from April 1, 1967 to December 18, 1971, while 75 Cr. 772 returned in the Southern District of New York encompasses the period from January 1, 1968,to June, 1973.*

Geographical Setting:

In both indictments the narcotics were stored and initially distributed to wholesale dealers in Queens who subsequently distributed in the Bronx and Manhattan.

*Though the Southern District indictment traces conduct on the part of others until June, 1973, the last substantive count charged against Alessi occurred in the summer of 1971.

Common Personnel:

Both incidents involve groups of approximately equal size: 22 named defendants in the Eastern District* and 32 co-conspirators in the Southern District. Significantly, the two indictments share 8 common** co-conspirators functioning at both ends of the conspiracy. Thus, Papa, Alessi, the two D'Amato brothers and Passero are charged in both indictments as first level suppliers in Queens. Anthony Loria is depicted as a customer of this group in both and William Huff is a purchaser from the wholesalers in both cases.

*The eastern district case was not tried and no bill of particulars of other co-conspirators was provided though the indictment indicated the existence of others to the grand jury unknown.

**In addition, on May 3, 1976 in a telephonic conversation, Assistant United States Attorney James Lavin informed counsel for the defendant that the government was adding Curtis Newell to the list of co-conspirators in this case. Upon information and belief based on conversations with which persons familiar with the 1972 Eastern District indictment, the witness Paradiso testified in support of that indictment to dealings with Curtis Newell. Further, the government alleged the existence of yet another co-conspirator whose name it would not reveal despite the explicit terms of the trial court's order for discovery and a bill of particulars. Nor would the government respond to the simple inquiry whether this additional co-conspirator had figured in the old Eastern District case.

It is respectfully requested that the government be required to turn over the materials demonstrating Curtis Newell's participation in the Eastern District indictment and the disclosure of the name of the still secret co-conspirator.

Common Overt Acts:

A significant piece of evidence in both cases is the seizure of heroin from the D'Amatos in an apartment at 46-01 39th Avenue in Queens. This event is pleaded as overt act number 9 in the Southern District and overt act number 10 in the Eastern District.

Even this thumb nail sketch demonstrates the same conspiracy. Certainly enough is shown, under the rationale of Mallah, to shift the burden to the government to explain away the coincidences of persons, places and events.

Indeed, the indictments diverge only because they are predicated on the narrations of different co-conspirator witnesses. It is their difference in perspective which accounts for the slightly different portrayal in the two indictments of the identical conspiracy.

The Court has long recognized that narcotics conspiracies involve the vertical functional integration of many different people in the events from importation to street level distribution and well defined roles mark the activities at each level. Further, individuals at each level depend on the acts of those above and below them for their own success and are presumed to know of the broader scope of the conspiracy beyond their own immediate contacts. Just as any given conspirator's limited perspective does not limit his liability for the acts of other co-conspirators upon whom he vitally depends, so too, the limited perspective and knowledge of a particular co-conspirator witness

does not fractionalize a functioning chain conspiracy into several groups of shorter links. Given the clandestine nature of the business and the need to protect the secrecy of both sources and customer to avoid being cut out of the profitable middle-man role, it is difficult to imagine how any indictment, predicated on the testimony of a few co-conspirators, as are both indictments here, can possibly portray the full breadth of a large scale conspiracy. That so many common points emerge between these two indictments, based on the testimony of different co-conspirators, speaks eloquently for the identity of the conspiracies charged.

One need only compare the facts and analysis in United States v. Papa, supra to appreciate the appellant's contention that these two indictments involve the same conspiracy.

Papa also involved an Eastern District and a Southern District indictment, the Eastern District indictment being the same as here. However, the Southern District indictment though extensive enough to encompass 28 co-conspirators,* had only one** common conspirator, beside Papa himself, with the Eastern District case where 22 were indicted. Since Papa was the first link in the chain of supply in both cases and each group was fleshed

*Alessi was not named as a co-conspirator in Papa's Southern District case.

**Anthony Passers assumed a marginal role in the Southern District case in money changing activities. But by Papa's own counsel's exhortations to the jury, that money related to Eastern District activities.

out with a "full compliment of personnel", it was reasonable to infer two free standing operations. Slip Opinion at 1989. Applying the criteria of Mallah, this Court found:

> [T]here is nothing here to suggest that one conspiracy was a part of the other, nothing to suggest that 'others to the Grand Jury unknown' masked an overlap of personnel, and nothing to suggest that the success of one was in any way dependent upon or related to the other."

Slip Op. at 1989.

In this case only a schizophenic could infer the existence of two free standing groups, since both indictments involve common personnel at three different levels in the chain of distribution.

At the top level of supply are a core group of 4 partners - Papa, Alessi, Passero and D'Amato. In the Southern District case, Manfredonia testified to being able to get narcotics from all of them and frequently didn't remember which one of the partners accepted the order or arranged the delivery (T-439, 443, 450)* In an amazing parallel the Eastern District indictment charged these 4 jointly with supervising five others in narcotics activities on a continuing basis (21 U.S.C. §848) portraying by its very pleading the co-equal managing status of all 4 partners.

*Numbers in parenthesis refer to United States v. Iarossi, Southern District of New York, annexed hereto in appendix.

Apart from the 4 top people at the same place and time functioning in the same roles, at the next level of wholesale customers of the core group,both cases name Rocco Loria. Even assuming the absurdity of 4 co-conspirators maintaining two separate conspiratorial agreements and arrangements, certainly the same customer, Loria is not buying from two groups. Even further down the line of distribution is William Huff, a second level purchaser. With such "overlap of personnel" it is absurd to infer two groups.

The case for the appellant is stronger yet. In addition to 6 common co-conspirators at three different functional levels, there is compelling evidence that the success of one was dependant on and related to the other. Both cases involve evidence of a common overt act, the seizure of heroin from a co-conspirator's apartment in July, 1971. In the Southern District case there is evidence that the partners had difficulty supplying drugs after that point in time because of the seizure. At that same point in time in the Eastern District case, Papa withdrew from the conspiracy there, though he continued functioning until 1973 in the Southern District case where Alessi was not a co-conspirator. Predictably, the last substantive offense charged to Alessi in the Southern District occurred in the Summer of 1971.

After applying the relevant criteria and perceiving the inevitable result, the question immediately presents itself how the government can argue an apposite conclusion.

Perhaps the more appropriate inquiry is when the government decided to assume that stance, since they failed to request Alessi's indictment for conspiracy before the Grand Jury in the Southern District, an omission eloquently probative of the appellant's claim.

The district court's opinion in this case, issued 4 days after the decision in Papa, seems to err in drawing a conclusive presumption of separate conspiracies from the slight difference in perspective generated by different co-conspirator witness in the two cases.

Thus the Court refers to the "principals" in the Southern District as Manfredonia, Iarossi and Barone "while Alessi, Papa, Passero and Frank D'Amato appear to be the principals in the Eastern District indictment." (at p.3)*. It is difficult to understand why Alessi, Papa, Passero and D'Amato, who are depicted as the first level suppliers in both cases, are any less "principal" in the Southern District. As it is used by the District Court, the term "principal" is analytically a useless tool, since it does no more than relate to the viewpoint of

*Numbers refer to District Court opinion denying motion to dismiss the indictment annexed hereto in appendix.

the witness rather than the objective reality of the conspiracy's structure.

The court's reasoning continues:

> "Although Alessi, Papa, Passero and D'Amato acted as the source of supply for the Bronx groups, the two groups operated out of separate centers and employed different foot soldiers with the exception of William Huff who was a foot soldier common to both groups."

Not only do both cases charge activity at the same time in the same area, but the identical stashes emerge in both cases, an apartment in Queens which was raided in July, 1971. In addition, Huff's emergence as a second level purchaser in both cases cannot simply be dismissed as an "exception" (at p.8)* Indeed, it is the "exception" which proves the rule. In addition, the court failed to take notice of or attach any significance to Loria's presence in both cases.

Despite the six man overlap at three different functional levels, the court found "no evidence" that the groups were linked by mutual dependence and assistance or were aware of their part in a larger organization; a presumption which would seem to rise readily from the quantities dealt over a substantial number of years.

By the lack of mention in its opinion, it must be assumed that the court gave no weight to the common overt act, the seizure in July, 1971, which, as demonstrated above, cut the supply lines to different customers in both cases and halted the

*Number refers to District Court opinion denying motion to dismiss the indictment annexed hereto in appendix.

activity of Papa in the Eastern District case and Alessi in the Southern District case.

Finally, the district court concluded "the mere fact that Anthony Passero and William Huff are named as defendants in both indictments is not a sufficient connection to link two otherwise independent transactions or organizations into one conspiracy. However, the Appellant has never contended that the mere fact of indictment was at all relevant to the analysis. What is relevant are the six common co-conspirators, whether indicted or not, at three different levels in the conspiracy at the same time and place and the common overt act.

POINT III

THE GOVERNMENT MAY NOT PROSECUTE THE APPELLANT FOR THESE SUBSTANTIVE OFFENSES BECAUSE THE THEORY OF LIABILITY IN THE CONSPIRACY FOR WHICH THE APPELLANT HAS ALREADY BEEN PROSECUTED.

It bears repeating for the purposes of this argument that the substantive offenses charged here are Manfredonia's distribution to his customers in the Southern District of New York which the Appellant is charged with aiding and abetting by his previous distribution to Manfredonia in the Eastern District of New York. However, the government does not contend that Appellant actually knew of Manfredonia's subsequent transfers. Rather, they maintain that Appellant is liable for the subsequent distribution because it was the reasonably forseeable consequence of his act.* The theory really permits mens rea to be proved by presumption.**

A logical extension of that theory would permit prosecution of a defendant for every distribution after his until the ultimate consumer,no matter how many transactions removed. And, under the government's theory,venue could be at the situs of each transaction. And, of course, both of these

*Compare the presumption of knowledge of illegal importation under 21 U.S.C. §174. See too United States v. Turner, 396 U.S. 393, 24 L.Ed.2d 610 (1970)

**For the purposes of this argument it is assumed that this is a permissible definition of aiding and abetting.

propositions are not only logical extensions of this theory of aiding and abetting,but are the actual law of conspiracy. Indeed, the liability of a conspirator is bound on the notion that once he knows the basic aims of the conspiracy other crimes are forseeable. See Pinkerton v. United States, 328 U.S. 640 90 L.Ed. 1489 (1946), and that conspiracy can be charged in the district of any overt act. Thus,the substantive offense of aiding and abetting is,on this theory of mens rea, identical to the offense of conspiracy and consequently merges in it. See United States v. Ianelli. 461 F.2d 483 (2d Cir.) cert den 409 U.S. 980, 34 L.Ed.2d 243 (1972).

The same proof is sufficient for either,and the elements of the offense are identical. Does it matter then, that the government has designated 21 U.S.C. §841 in combination with 18 U.S.C. §2 rather than 21 U.S.C.§841 or 21 U.S.C. §174 and 18 U.S.C. §2 rather than 21 U.S.C. §173 as statutory authority for the prosecution. Certainly not. And, clearly, since the Appellant has already been prosecuted for this conspiracy,he cannot now be tried again.

Indeed,it is entirely justifiable to distinguish aiding and abetting based upon knowledge and specific intent to further an actual occurrence from aiding and abetting based on presumption knowledge for purposes of merger. Clearly,something more is required on the element of intent which makes the offenses distinct.

Thus, appellant has a valid double jeopardy claim in bar of this prosecution.

In addition, there is a separate and distinct due process claim.Whether the offense be denominated aiding and abetting or conspiracy, it can be prosecuted in either the Southern or Eastern Districts of New York.

Where the government has promised not to prosecute any overt act which might constitute a substantive offense in the Eastern District of New York can it choose an alternative venue to renege on its promise. To permit the government to behave as if it were composed of autonomous, indeed opposed, baronnies thwarts the objectives of Santobello v. United States, 404 U.S. 257 (1971). And it is just as unreal a separation as the finding of two distinct conspiracies here. This is the rare case wnere choice of venue can be not merely prejudicial to the defense but fatal. The government should not be permitted an alternative which ignores every consideration of comity to the defendant,including the location of his residence and the convenience of witnesses,solely to circumvent its agreement.

In sum, the Appellant is suing on the contract on what must be deemed an implicit warranty that his Eastern District substantive offenses would not be projected across the river.

CONCLUSION

For the reasons stated, appellant's motion to dismiss the indictment herein should be granted.

Respectfully submitted,

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5/18/76